IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7715 of 2003

with

CRIMINAL REVISION APPLICATION No 167 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMRUTBHAI BHOLIDAS PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 7715 of 2003

MR YM THAKKAR for Petitioner No. 1

MR SS PATEL APP for Respondent No. 1

..... for Respondent No. 2-3

2. Criminal Revision Application No. 167 of 2003

MR YM THAKKAR for Petitioner No. 1

PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 10/11/2003

ORAL JUDGEMENT

The petitioner above named has preferred this application u/s.407 of the Code of Criminal Procedure, 1973 (for short, "the Code") for the transfer of Sessions Case No.85/2000 from the Court of the learned Addl. Sessions Judge (Shri R.M.Parmar), Ahmedabad (Rural) to any other Judge of the Sessions Court of Ahmedabad (Rural) in the interest of justice.

2. The facts of the case of the petitioner may be briefly stated as follows;

2.1 The petitioner is one of the accused persons facing trial before the aforesaid Court. During the pendency of the said sessions case, evidence was being recorded and during the course of recording of evidence, certain points had arisen for decision by the said Court. In fact, it appears from the order of the trial court that following points were raised before it during the course of recording of evidence;

(i) Whether the F.I.R. dated 20/02/2000 filed by the Aartiben Arvindbhai Patel be treated as F.I.R. and be accepted as such ?

(ii) Whether the statement of the deceased given to Aartiben be treated to be an Oral Dying Declaration ?

(iii) Whether the statement made by accused no.1 before Police Inspector, Ellisbridge Police Station would be admissible in evidence ?

2.2 The trial court heard the parties and directed that the aforesaid F.I.R. given by Aartiben be treated as F.I.R.. With respect to the oral dying declaration, the decision was reserved. The objection with respect to the admissibility of the statement made before the aforesaid police inspector was held admissible. The said order was pronounced by the said Court on 03/09/02.

3. Feeling aggrieved by the said order of the trial court, the petitioner herein preferred Special Criminal

Application No.727/2002 before this Court which came up for hearing before this Court on 17/01/03. During the course of hearing, the learned advocate for the petitioner as well as the learned Special Public Prosecutor agreed that the aforesaid points should have been decided at the end of trial during the course of the judgment and not earlier than that. Therefore, they also agreed that the order of the trial court may be set aside and the said three points may be kept open for being decided during the course of the judgment. They further agreed that the parties would be at liberty to advance their arguments, on admissibility of the documents, as well as on evidentiary value thereof, with respect to the aforesaid three points, which were the subject matters of the aforesaid special criminal application. On the strength of the aforesaid agreement between the learned advocates for the petitioner and the learned Special Public Prosecutor and on the strength of the aforesaid arguments advanced by them, the aforesaid order dated 03/09/02 recorded by the trial court was ordered to be set aside. The trial court was directed to hear the final arguments and consider the aforesaid three points and decide the same, during the course of the judgment. It was also made clear that the parties would be at liberty to advance fresh arguments on the aforesaid three points which were the subject matter of the aforesaid special criminal application. The said special criminal application was disposed of accordingly.

4. Thereafter, the matter was sent back to the trial court and the petitioner herein submitted an application being Cr.Misc.Appl.No.226/2003 before the learned Sessions Judge, Ahmedabad (Rural) u/s.408 of the said Code for the transfer of the said sessions case. There, it was contended by the petitioner herein, that the points which were required to be dealt with by the trial court had already been discussed and decided by the said Court and therefore, the trial court may not decide the said points again in a different manner and therefore, it would be necessary that the matter may be placed before some another Judge, who may hear the parties afresh and decide the entire case, including those three points referred to hereinabove.

5. By an order dated 20/03/03, the learned Sessions Judge rejected the said application mainly on the ground that a Sessions Judge had no power or authority to transfer a part heard sessions case pending before an Addl. Sessions Judge to another Addl. Sessions Judge in the same Sessions Division.

6. The petitioner herein felt aggrieved by the said order of the trial court and preferred Criminal Revision Appl.No.167/2003 challenging the said order of the said Court. Simultaneously, the petitioner has preferred this application before this Court for the transfer of the aforesaid sessions case from the Court in which it is pending to any other Court on the ground that the learned Addl. Sessions Judge has already recorded his findings and decision on the aforesaid three points, and therefore, the said Addl. Sessions Judge cannot take a view different from the view he had recorded earlier and therefore, it would be in the fitness of things to transfer the said sessions case to the Court of another Addl. Sessions Judge.

7. It seems that Mr.K B Anandjiwala learned advocate has appeared on behalf of the original complainant and he has contended that there is no ground for the transfer of the aforesaid sessions case from one court to another. It has been mainly contended by him that at the first instance, the learned Addl. Sessions Judge had reserved his decision on the aforesaid three points, but thereafter, an application was submitted on 28/06/02 at Ex.102 on behalf of the accused persons, stating that they wanted to have decision on the aforesaid three points and then to decide as to whether or not they would require to recall all the witnesses for further cross-examination on the aforesaid three points.

8. On receiving the said application, the learned Sessions Judge after hearing, passed an order that the issue with respect to the statement made to the police officer be heard and decided at the stage of final hearing. Further, if it is found to be proper by the Court to recall the witnesses, then the Court may, on an application of the accused persons, recall the witnesses and pass appropriate orders on merits of the case. That, therefore, it was not necessary to recall the witnesses on that particular stage.

9. I have heard the arguments advanced by the learned advocate for the petitioner and the learned APP for the State. I have also heard Mr.K B Anandjiwala learned advocate appearing for the original complainant. The learned advocate for the petitioner has argued at length that the aforesaid three points were discussed and two of them were decided by the Court concerned though it was decided to reserve the decision at the final judgment. It has also been contended that once the learned Judge has decided the said two issues, then the same Judge would not or may not decide the said points

afresh on merit and it is likely that the old decision may be repeated. As against this, the learned advocate for the original complainant as well as the learned APP both have argued that what the learned Judge has decided is only the admissibility of evidence on the said points. They have also submitted that the trial court has not decided anything about the evidentiary value of the said evidence. That, therefore, the application is not required to be allowed and there is no ground to transfer the said case from one Court to another. It has been contended by them that admissibility of a document is one thing and the evidentiary value thereof is a different thing. It has also been argued by them that even if a point of admissibility has been decided by the Court at one point of time, it would be open to the said Court to take a different view, after fresh hearing, in view of the decision of this Court. Even with respect to the evidentiary value of the said evidence, the Court has not recorded any decision and therefore, it would still be open to the petitioner and other accused persons to advance their arguments on the said issue and naturally, the Court would be at liberty to decide the said issue afresh, on the issue of admissibility of documents and also on the issue of evidentiary value thereof.

10. The facts are not very much in dispute. The aforesaid issues were raised during the course of cross-examination of the witness and the aforesaid order was passed by the trial court. However, on going through the order of the trial court, it can be gathered that the petitioner and other accused persons wanted a decision on the aforesaid issues, before the judgment could be pronounced, so that the petitioner and other accused persons could decide as to whether or not the witnesses may be recalled for further cross-examination with respect to the aforesaid three points.

11. On the other hand, the learned advocate for the petitioner has stated at the bar that the aforesaid three points were taken up for final hearing and decision, before the final arguments, after recording of further statement of the accused persons at the instance of the Court itself.

12. At the same time, it is also required to be considered that the learned advocate for the original complainant has made it clear that the aforesaid issues were decided by the trial court only with a view to avoid a possible argument by the accused persons in appeal, if convicted, that they were not given a reasonable opportunity of cross-examination of the witnesses despite

their application Ex.102 before the trial court. It has also been argued by Mr.Anandjiwala that when the aforesaid three points were reserved for final arguments and decision, it was not necessary for the petitioner and other accused persons to submit an application Ex.102 to reserve their right to recall witnesses for further cross-examination on receiving decision on the aforesaid three points.

13. Now, it is very clear that if a particular issue has been decided finally, during the course of the judgment, there would not be any scope for any party to apply for recall of witnesses for further cross-examination. An application for the recall of witnesses for further cross-examination can be filed, only before the matter is finally disposed of and the judgment is finally pronounced.

14. Therefore, on the one hand, as appears from the aforesaid application and the arguments of the learned advocate for the complainant, the petitioners and other accused persons reserved their right to recall the witnesses for further cross-examination on the aforesaid three points and on the other hand, when the said point was decided by the said Court, the petitioner has come out with an application for the transfer of the said sessions case.

15. It, therefore, can be gathered that the said three points were decided by the learned Judge with a view to provide an opportunity to the petitioner and other accused persons to recall the witnesses for further cross-examination on the aforesaid three points, so that the matter may not be required to be agitated and dealt with and decided by the higher Court, during the course of an appeal, if filed by the present petitioner and other accused persons, in case of their conviction.

16. Even the learned Sr.Advocate appearing for the petitioner agrees that there would be no scope for recall of witnesses for further cross-examination on the aforesaid three points, after the disposal of the sessions case by way of final judgment by the learned Judge.

17. Even otherwise, when the learned advocates for the parties had agreed before this Court, as stated in the aforesaid order of this Court dated 17/01/03 in S.Cr.A.727/2002 that the impugned order may be set aside and the issues may be kept open for decision by the Court concerned, it is important to note that at that stage no

prayer was made for placing the aforesaid sessions case before some another Judge.

18. It is also required to be considered that when a matter is sent back by this Court, it is not necessary that the matter should go to some another Judge. It would be open to the advocates and the parties to advance their arguments before the same Judge afresh and the learned Judge concerned would be at liberty to decide the said matter afresh without being prejudiced by earlier observations made by him during the course of his earlier order. Therefore, it would not be proper for the petitioner to argue before this Court that the learned Judge may take the same view and may not take a view different from the view recorded by him in the aforesaid order dated 03/09/02 below application Ex.132.

20. The petitioner had also contended before the trial court in para 6 of his application at page 3 in Cr.Rev.Appl.167/2003, that after the transfer of the learned Judge as Joint District Judge, all the cases pending before the Third Court were transferred to the Court of the learned Addl.Sessions Judge (Shri R.M.Parmar). That, thereafter, Shri P.P.Chaudhary was also appointed as Addl. Sessions Judge in the said Sessions Court and therefore, upon the orders of Shri R.M.Parmar, who appears to be Incharge Sessions Judge, the cases of the Third Court which had gone to his Court were re-transferred to the Third Court. That while so doing, only two cases, including the aforesaid sessions case, was kept by Mr.Parmar with him. It has also been contended in the said para of the said transfer application that Shri Parmar himself knew the reason for keeping those two cases with him. That, ordinarily, an incharge District Judge does not issue orders for the transfer of cases and distribution of work. That moreover, though he had been transferred to the link Court at Gandhinagar, his insistence to take up this case, shows that there is an apprehension in the mind of the petitioner that he would be prejudiced. However, the above point was not raised during the course of his arguments by the learned Sr.Advocate appearing for the petitioner.

21. In para 5 of the said transfer application, it was also stated that the aforesaid three issues were raised by the learned Judge himself and were decided by himself. Now, it is not much in dispute that the aforesaid issues were raised by the learned advocate appearing for the accused persons before the trial court and the issues were raised even during the

cross-examination of witness Mr.Bodar. However, the aforesaid application was submitted reserving a right for the petitioner to recall the witnesses for further cross-examination. Therefore, the learned trial Judge appears to have decided the said issues as preliminary issues, before the final decision was recorded, with a view to provide an opportunity to the petitioner and other accused persons to recall the witnesses for further cross-examination on the aforesaid three issues. In that view of the matter, it cannot be said that the learned Judge took up the issues himself to decide them on merit, before the pronouncement of judgment.

22. The learned Sr.Advocate for the petitioner has also argued that once the learned trial Judge had decided that those three points be decided at the stage of final decision, it was not necessary for him to take up those three issues before the final hearing took place. At this stage, again Mr.Anandjiwala has argued for the original complainant that these three issues were discussed and decided by the trial court before taking up the matter for final hearing, only with a view to provide an opportunity to the petitioner and other accused persons, to recall the witnesses for further cross-examination, in terms of their application Ex.102 before the trial court. As said hereinabove, there would be no stage for recall of witnesses for further cross-examination, once the final arguments are heard and the aforesaid three points are decided during the course of the judgment by the trial court.

23. It has also been contended that once the trial court has decided the aforesaid three issues against the accused persons, the same Judge may not decide the said points again in favour of the accused persons. As said above, it happens in many cases that an issue has been decided as preliminary issue and ultimately, the parties agree to see that the said issue is decided during the course of the judgment. In that case, it cannot be said that the same Judge will not decide the said issue afresh on merit and may be influenced by his earlier observations made by him during the course of his earlier order.

24. Moreover, it is very clear from the order of this Court that the learned advocates for both the parties had agreed that the impugned order of the trial court deciding two of the three points as aforesaid may be set aside and the matter may be sent back for fresh decision. That would mean that the parties had agreed to send the matter back to the Court concerned. Else there would

have been a request to transfer the said case to some another Judge for decision according to law afresh. No such request was made at that point of time and there is no dispute about the same also. Therefore, once a request was made to set aside an order and to send the matter back for fresh decision during the course of judgment, it would clearly mean that the parties never intended that there would be a likelihood of hearing the same decision on the said two points by the same Judge.

25. In that view of the matter, I am of the view that it cannot be said that the petitioner had a reasonable apprehension that the learned Judge would not decide the aforesaid two points (the third has been kept open as aforesaid) afresh, without being influenced by his earlier observation and therefore, there is no reason to transfer the aforesaid sessions case from one Court to another.

26. In that view of the matter, I am of the view that this is not a fit case wherein this Court should interfere with the aforesaid proceeding and therefore, it is not necessary, in the interest of justice, to transfer the said case from one Court to another. Therefore, the application is without any merit and deserves to be dismissed.

27. For the foregoing reasons, this application of the petitioner for the transfer of Sessions Case No.85/2000 from one Court to another is ordered to be dismissed. It is again made clear that the trial Court will deal with and decide the aforesaid issues afresh, without being influenced by his earlier observations made by him in his earlier order and after providing a reasonable opportunity of hearing to the parties.

(D. P. Buch, J.)

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